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Supreme Court, U.S.
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No. 03-1404

IN THE

Supreme Court of the United States

GARY L. BASS, LEWIS B. CEI,
AND DUNCAN M. MILLS,

Petitioners,

v.

IRA W. MADISON AND
THE UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN RESPONSE TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether section 3 of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1, is consistent with the Establishment Clause.

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INTRODUCTION

This case raises a narrow but important question as to which the federal courts of appeal are divided. The question is whether Congress may, consistently with the Establishment Clause of the First Amendment, require States to alleviate burdens on the religious exercise of persons confined to State institutions as a condition of receiving federal financial support. That is what Congress did in section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1.

The district court in this case held that this accommodation offends the Establishment Clause because it places "religion above other fundamental rights." Pet. App. 30. The court reasoned, in effect, that where religious accommodation is concerned, other fundamental liberties must march in lockstep with religious freedom. Before the Fourth Circuit decided the present appeal, the Sixth Circuit agreed with this reasoning and adopted it as its sole basis for holding Section 3 unconstitutional. See *Cutter* v. *Wilkinson*, 349 F.3d 257, 263-68 (6th Cir. 2003).

In the decision below, however, the Fourth Circuit correctly rejected this reasoning. Writing for a unanimous court, Judge Wilkinson recognized that the analysis adopted by the district court—and the Sixth Circuit—"would work a profound change in the Supreme Court's Establishment Clause jurisprudence and in the ability of Congress to facilitate the free exercise of religion in this country." Pet. App. 17

Although respondent agrees with the Fourth Circuit's decision, he concedes that this Court should decide the constitutional question presented by the holding below. There is a clear and undeniable conflict among the federal appellate courts on the question whether Section 3 violates the Establishment Clause, with the Sixth Circuit siding with the *Madison* district court in striking down the statute, and the Seventh

and Ninth Circuits agreeing with the Fourth Circuit in upholding it. For this reason, and in the interest of a clear, comprehensive resolution of the Establishment Clause question, respondent does not oppose petitioners' request for certiorari on that issue.

However, the other issues raised in the Petition—regarding the Spending Clause, the Commerce Clause, and the *Ex parte Young* doctrine—were not decided by either of the courts below in this case and are not the subject of a split in decisional authority. Those issues, therefore, are not ripe for this Court's review.

STATEMENT OF THE CASE

Respondent is an inmate in the custody of the Virginia Department of Corrections (DOC). He adheres to the Hebrew Israelite faith, which requires him to consume a kosher diet. Such a diet is provided throughout the Virginia prison system under the rubric of "common fare" diet.

Prior to filing the present lawsuit, respondent had requested the common fare diet, and at least two local prison officials had recommended that the request be granted. However, both recommendations were overruled by DOC officials in Richmond.[1] In August 2001, after the second denial, Mr. Madison filed suit claiming, inter alia, that the refusal to accord him a kosher diet violated Section 3 of RLUIPA.[2]

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[1] The stated reason for the denials was that Mr. Madison did not have a genuine religious need for a kosher diet. Petitioners appear to have abandoned that line of argument. Mr. Madison's lifelong self-identification as a Hebrew Israelite and that religion's requirement of a kosher diet are amply supported in the record. *See, e.g.*, Joint App. 31-36, 39-41, 51-53, 72.

[2] On March 1, 2004, petitioners agreed temporarily to allow Mr. Madison to have the common fare diet, conditioned on his agreeing to a stay of the district court proceedings and not objecting to petitioners' motion for an extension of time to file their petition. Pursuant to that agreement, Mr.

The defendants (petitioners here) moved for summary judgment on the ground, among others, that Section 3 was unconstitutional. The district court agreed, ruling that RLUIPA violates the Establishment Clause by "advancing religion above other fundamental rights and conscientious beliefs." Pet. App. 29-30. The court understood the First Amendment's requirement of governmental neutrality toward religion as requiring government to maintain a neutral posture between religion and all the liberties secured by the Constitution. Accordingly, by the district court's reasoning, a legislature may not accommodate religious exercise without correspondingly accommodating all other "fundamental" rights. See *id.* at 42. Having concluded that Section 3 is unconstitutional, the district court dismissed Mr. Madison's RLUIPA claims.

Expressly recognizing the importance of this issue, however, the district court, in the same order, certified its ruling for interlocutory appeal. The Fourth Circuit subsequently granted permission to appeal that order to Mr. Madison and to the United States, which had intervened to defend the statute's constitutionality.

At the time of the district court's ruling below, two federal circuit courts had upheld RLUIPA against Establishment Clause challenges. See *Charles* v. *Verhagen*, 348 F.3d 601, 610-11 (7th Cir. 2003); *Mayweathers* v. *Newland*, 314 F.3d 1062, 1068-69 (9th Cir. 2002), *cert. denied*, 124 S. Ct. 66 (2003). No circuit court had held the statute unconstitutional until November 7, 2003, when the Sixth Circuit—in an opinion that drew heavily on the district court's opinion in this case—held that RLUIPA violates the Establishment Clause. *Cutter*, 349 F.3d at 263-68. By contrast with *Charles* and *Mayweathers*, each of which addressed and rejected other

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Madison is now receiving the common fare diet and will continue to receive it until all proceedings are concluded in this Court.

constitutional challenges to RLUIPA, the *Cutter* court confined its analysis to the Establishment Clause.

A month later, on December 8, 2003, the Fourth Circuit joined *Charles* and *Mayweathers* and reversed the district court's ruling in this case. Pet. App. 2-22. The unanimous panel held that "Congress may accommodate the exercise of faith by lifting government-imposed burdens on free exercise." *Id.* at 11 (citing *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 335 (1987)). Expressly disagreeing with the district court's reasoning, which was the linchpin of the Sixth Circuit's ruling in *Cutter*, the panel further held that "the Establishment Clause's requirement of neutrality does *not* mandate that when Congress relieves the burdens of regulation on one fundamental right, that it must similarly reduce government burdens on all other rights." *Id.* at 15 (emphasis added).

The panel also rejected petitioners' alternative Establishment Clause argument based on *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985). The court noted that *Caldor* involved a legislative mandate on private parties, whereas Section 3 of RLUIPA merely encourages State governments to abide by the conditions attached to federal disbursements. See Pet. App. 19.

The Fourth Circuit's opinion, like the district court's opinion (and like *Cutter*), was limited to the issue of RLUIPA's validity under the Establishment Clause. And that is the only issue as to which the appellate courts are divided.

ARGUMENT

The petition for certiorari should be granted as to the first issue presented, thereby allowing this Court to resolve the square circuit conflict over whether Section 3 of RLUIPA violates the Establishment Clause. The Court, however, should decline to take up petitioners' other arguments, which

were not addressed by the courts below and are not the subject of a split in authority.

I. THE QUESTION WHETHER RLUIPA VIOLATES THE ESTABLISHMENT CLAUSE WARRANTS THIS COURT'S REVIEW.

The Fourth Circuit was right to reject the district court's Establishment Clause analysis and to hold, in keeping with a long line of controlling decisions, that accommodations of religion such as Section 3 are constitutionally permissible. Nevertheless, respondent recognizes that, on this point, there is a clear and direct conflict between the decision below and the Sixth Circuit's decision in *Cutter*. The constitutionality of Section 3, moreover, is an important issue that affects the religious-freedom rights of State prisoners nationwide, as well as the interests of all State governments. Respondent therefore concedes that this Court's review is warranted as to that issue.

Review is appropriate for the additional reason that this case presents not only the district court's Establishment Clause theory (which was endorsed by the Sixth Circuit in *Cutter*), but also two alternative theories advanced by petitioners: a "federalism" construction of the Establishment Clause, see Pet. 11-15, and a novel interpretation of *Caldor*, see *id.* at 15-18. Review of this case would therefore provide an opportunity for the fullest possible treatment of the Establishment Clause implications of Section 3 of RLUIPA—and of governmental accommodation of religion more broadly.

Accordingly, for the sake of clarity and certainty, respondent agrees with petitioners that this Court should grant review and resolve the open question of Section 3's consistency with the Establishment Clause.

II. THE OTHER ISSUES RAISED BY PETITIONERS DO NOT WARRANT THIS COURT'S REVIEW.

Petitioners also ask this Court to consider Congress's power to enact RLUIPA under the Spending Clause and the Commerce Clause, as well as the applicability to RLUIPA of the doctrine established in *Ex parte Young*, 209 U.S. 123 (1908). See Pet. 18-30. However, none of these issues was addressed by the courts below, none is the subject of divided authority, and none warrants review by this Court.

1. As noted previously, both the Fourth Circuit's decision and the decision on the other side of the circuit split, *Cutter*, were confined to the Establishment Clause. So was the district court's decision in this case. Thus, all of these opinions proceeded on the assumption that Section 3 of RLUIPA was within Congress's Article I Spending Clause power, and considered only the extent to which that power is curtailed by the Establishment Clause.

Moreover, those courts that have addressed Spending Clause and Commerce Clause challenges to Section 3 have uniformly rejected them. See *Charles*, 348 F.3d at 606-09 (rejecting Spending Clause challenge); *Mayweathers*, 314 F.3d at 1066-68 (same); *Sanabria* v. *Brown*, No. 99-4699 (D.N.J. June 5, 2003) (same); *Johnson* v. *Martin*, 223 F. Supp. 2d 820, 827-32 (W.D. Mich. 2002) (rejecting Commerce Clause and Spending Clause challenges), *vacated on other grounds sub nom. Cutter* v. *Wilkinson*, 349 F.3d 257 (6th Cir. 2003); *Taylor* v. *Cockrell*, Civ. No. H-00-2809 (S.D. Tex. Sept. 25, 2002) (rejecting Spending Clause challenge); *Gerhardt* v. *Lazaroff*, 221 F. Supp. 2d 827, 831-32 (S.D. Ohio 2002) (same), *rev'd on other grounds sub nom. Cutter*.[3]

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[3] One district court has upheld a Commerce Clause challenge to Section 2 of RLUIPA, which governs religious land use. *See Elsinore Christian Ctr.* v. *City of Lake Elsinore*, 291 F. Supp. 2d 1083, 1103-04 (C.D. Cal. 2003). However, no federal court, trial or appellate, has so ruled with respect to Section 3 of RLUIPA, which governs religious exercise by pris-

Thus, not only have those issues not been addressed in this case, but there is no circuit split that needs to be resolved.

2. Petitioners' contention that this case raises new and pressing Spending Clause issues, see Pet. 18-25, is also mistaken. RLUIPA is a conventional Spending Clause enactment, well within the bounds this Court set in *South Dakota* v. *Dole*, 483 U.S. 203 (1987), and its progeny. Far from compelling States "to surrender an aspect of their sovereignty," Pet. 19, RLUIPA simply "attach[es] conditions on the receipt of federal funds"—an unquestioned incident of Congress's power to provide for the general welfare. *Dole*, 483 U.S. at 206; *accord New York* v. *United States*, 505 U.S. 144, 167 (1992).

Contrary to petitioners' contention, it is immaterial that the condition in question touches what is otherwise an area of exclusive State prerogative. Such conditions are not only an acceptable but a commonplace feature of Spending Clause legislation, which is often the vehicle for achieving ends that are beyond the scope of Congress's other enumerated powers. A State may, in its sovereign discretion, accept or reject the

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oners. And the vast majority of courts addressing Spending Clause and Commerce Clause challenges to Section 2 have rejected those challenges as well. *See Castle Hills First Baptist Church* v. *City of Castle Hills*, No. SA-01-CA-1149-RF, 2004 WL 546792, at *19 (W.D.Tex. Mar. 17, 2004) (rejecting Commerce Clause challenge); *United States* v. *Maui County*, 298 F. Supp. 2d 1010, 1015 (D. Haw. 2003) (same); *Westchester Day Sch.* v. *Village of Mamaroneck*, 280 F. Supp. 2d 230, 238 (S.D.N.Y. 2003) (same); *Life Teen, Inc.* v. *Yavapai County*, No. Civ. 01-1490-PCT-RCB, slip op. at 25-27 (D. Ariz. Mar. 26, 2003) (same); *Gordon* v. *Pepe*, No. Civ. A-00-10453-RWZ, 2003 WL 1571712, at *1 (D. Mass. Mar. 6, 2003) (rejecting Commerce Clause and Spending Clause challenges); *Hale O Kaula Church* v. *Maui Planning Comm'n*, 229 F. Supp. 2d 1056, 1072 (D. Haw. 2002) (rejecting Commerce Clause challenge); *Freedom Baptist Church* v. *Township of Middletown*, 204 F. Supp. 2d 857, 866-67 (E.D. Pa. 2002) (same).

Apparently no court has ruled on the applicability of *Ex parte Young* to RLUIPA.

federal money. Cf. *New York*, 505 U.S. at 168 ("[T]he residents of the State retain the ultimate decision as to whether or not the State will comply. If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant."). But once having accepted the federal money with express strings attached, a State may not cry foul when the grant is made conditional on a clearly established federal requirement that is otherwise within Congress's power.

In short, petitioners' protestation of coercion, see Pet. 22, is really a plea for unencumbered federal largesse.[4] Such a construction of the Spending Clause, which would gut the Clause as an instrument of congressional policy, runs directly counter to this Court's long-standing jurisprudence. See, *e.g.*, *Dole*, 483 U.S. at 206 ("Incident to [the spending] power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'") (quoting *Fullilove* v. *Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.)); *Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275, 294 (1958) ("the Federal Government may establish and impose reasonable conditions relevant to the federal interest in the project and to the overall objectives thereof"); cf. *New York*, 505 U.S. at 167 ("Where the recipient of federal funds is a State, . . . the conditions attached to the funds by Congress may influence a State's legislative choices.").

Petitioners' "relatedness" argument, see Pet. 22-23, likewise departs from precedent, as is clear from a review of *Dole*

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[4] In this regard, it bears noting that federal funds account for less than one percent of Virginia's prison budget. Thus the specter of "a *complete loss* of *all* federal funds," Pet. 22 (emphasis in original), is considerably less dramatic than petitioners imply. Moreover, even that slight loss is entirely conjectural, as the federal government has not reduced DOC's funding or even threatened to do so.

itself. There, this Court found a sufficient nexus between federal highway funds and a minimum-drinking-age condition because "the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel." 483 U.S. at 208-09. RLUIPA easily satisfies this minimal relatedness test. A principal purpose of federal prison funding is the rehabilitation of inmates, to which religion may reasonably be deemed conducive. Indeed, Congress found that enhanced religious freedom likely would improve at least some inmates' prospects of rehabilitation. See, *e.g.*, 139 Cong. Rec. S14,465 (daily ed. Oct. 27, 1993) (statement of Sen. Hatch) ("exposure to religion is the best hope we have for rehabilitation of a prisoner"); *id.* at S14,466 (statement of Sen. Dole) ("if religion can help just a handful of prison inmates get back on track, then the inconvenience of accommodating their religious beliefs is a very small price to pay"). The relationship between religious freedom and inmate rehabilitation is at least as close as that between the minimum drinking age and highway construction policies at issue in *Dole*.

3. Petitioners' Commerce Clause argument likewise does not warrant this Court's consideration. Indeed, the Commerce Clause provision of RLUIPA—section 3(b)(2), making the statute applicable where a burden on religious exercise affects interstate or foreign commerce[5]—is not even at issue in this case. From the start, respondent has relied on RLUIPA's Spending Clause provision, section 3(b)(1),[6] and has not attempted to lay the predicate for a claim under section 3(b)(2).

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[5] 42 U.S.C. § 2000cc-1(b)(2) (providing that RLUIPA applies where "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes").

[6] 42 U.S.C. § 2000cc-1(b)(1) (providing that RLUIPA applies where "the substantial burden is imposed in a program or activity that receives Federal financial assistance").

4. Petitioners' argument that *Ex parte Young* bars respondent's claim, see Pet. 26-30, is equally undeserving of this Court's review. It has been settled for a century that a suit seeking prospective injunctive relief against a State official does not violate the Eleventh Amendment. *Young*, 209 U.S. at 159-62; see also *Green* v. *Mansour*, 474 U.S. 64, 68 (1985). Petitioners cite no decision of any court calling that principle into question. Contrary to petitioners' argument, moreover, neither *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996), nor *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), is remotely apposite.

In *Seminole Tribe*, this Court declined to allow the Tribe's suit against Florida officials because "Congress ha[d] prescribed a detailed remedial scheme for the enforcement against" the State as an *alternative* to the suit before it. 517 U.S. at 74. In sharp contrast to *Seminole Tribe*, the remedial scheme prescribed by RLUIPA *is* private prisoner suits like the one at issue here. See 42 U.S.C. § 2000cc-2(a). Thus, rather than prescribing an alternative remedial scheme, RLUIPA prescribes the very remedy Plaintiff is employing in this case.

Coeur d'Alene is equally inapplicable. There, the Court chose not to apply *Ex parte Young* because the "suit would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory." 521 U.S. at 282. Here, however, petitioners cite no authority equating a State's interest in the sovereign control of its lands—which possess "a unique status in the law and [are] infused with a public trust the State itself is bound to respect," *id.* at 283—with a State's operation of its prison system. On the contrary, suits pursuant to *Ex parte Young* are routinely allowed against State officials to challenge prison operations. See, *e.g.*, *Hutto* v. *Finney*, 437 U.S. 678, 690 (1978); *Williams* v. *Wisconsin*, 336 F.3d 576, 581 (7th Cir. 2003); *Mayweathers*, 314 F.3d at 1069-70; *Hill*

v. *Butterworth*, 133 F.3d 783, 785 (11th Cir. 1997), *vacated on other grounds*, 147 F.3d 1333 (11th Cir. 1998).

* * * *

In sum, with respect to the Spending Clause, the Commerce Clause, and the *Ex parte Young* doctrine, petitioners are asking for major revisions of established legal principles, without even the suggestion of a circuit split, and without the benefit of an analysis by either court below. There is no basis for this Court's review of these issues.

CONCLUSION

The petition for a writ of certiorari should be granted limited to question 1, specifically, the validity of Section 3 of RLUIPA under the Establishment Clause.

Respectfully submitted,

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